IN THE

Supreme Court of the United States

OCTOBER TERM—1945

No. .....

SOLLY WEISS,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

The opinion of the District Court has been reported at 57 F. Supp. 747. The opinion of the Circuit Court of Appeals has not yet been reported.

II

Jurisdiction

1. The date of the judgment to be reviewed is June 20, 1945 (p. 155).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347(a)).

III

Statement of the Case

This is a criminal action decided in the Circuit Court of Appeals for the Second Circuit in which final judgment has been entered (p. 155). Petitioner prays that this Court, by certiorari, require the lower court to certify the cause to this Court for determination. The cases which it is believed sustain the petition to this Court are as follows:

United States v. *Yuginovich*, 256 U. S. 450;
McNabb v. *United States*, 318 U. S. 332;
Nardone v. *United States*, 308 U. S. 338.

IV

Statement of Facts

The facts and questions involved have already been stated in the preceding petition at pages 1 to 6 which statement is hereby adopted and made a part of this brief.

V

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the penalties of the Emergency Price Control Act of 1942 apply to the offenses charged in the Information rather than the penalties prescribed by Section 11 of the Stabilization Act of 1942.

2. The Circuit Court of Appeals erred in holding that it was unnecessary for a seller, not the agent of the owner of the goods in question, ever to have title to the goods in order to convey the same, under its construction of Section 4(a) of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. 904(a)).

3. The Court erred in holding that there was any evidence that petitioner offered to sell or sold any of the whiskey in question.

4. The Circuit Court of Appeals erred in affirming the judgment of the District Court, because of the absence of any proof of any maximum legal price attributable to offers to sell or sales by petitioner.

POINT A

The sentence imposed by the Court exceeds the legal maximum prescribed for the offenses charged.

In addition to the term of imprisonment to which petitioner was sentenced, the Court imposed a fine of $5,000 on each of Counts 2, 3, 5, 6 and 12 of the Information. In imposing this fine the Court applied the penalties prescribed by Section 205(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. 925). This section provided a penalty for violation of Section 4 of the Act (50 U. S. C. A. App. 904) of a fine of $5,000.

The Emergency Price Control Act of 1942 was amended on October 2, 1942 by the Stabilization Act of 1942 (50 U. S. C. A. App. 961-971). The Stabilization Act of 1942 authorized the President to issue a general order stabilizing prices, wages and salaries affecting the cost of living, and conferred power upon him to delegate his authority. The same Act extended the Emergency Price Control Act of 1942, with certain specified exceptions, to June 30, 1944 (50 U. S. C. A. App. 967). This section provides in part as follows:

> "(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of

> 1942 (section 901 et seq. of this Appendix) which are applicable with respect to orders or regulations under such Act shall, *insofar as they are not inconsistent with the provisions of this Act,* be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act." (Emphasis supplied.)

The Stabilization Act of 1942 prescribed the punishment for violating its provisions or any regulation promulgated thereunder, fixing the maximum fine for such violation at $1,000 instead of $5,000 as provided in the Emergency Price Control Act. The penalty provision of this Act reads as follows (50 U. S. C. A. App. 971):

> "Any individual, corporation, partnership, or association willfully violating any provision of this Act, *or of any regulation promulgated thereunder,* shall, upon conviction thereof, be subject to a fine of not more than $1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment. Oct. 2, 1942, c. 578, § 11, 56 Stat. 768." (Emphasis supplied.)

Pursuant to the authority granted to the President by the Stabilization Act of 1942, the President issued Executive Orders 9250 and 9328, Executive Order 9250 (50 U. S. C. A. App. p. 314) dealing with the stabilization of national economy, and Executive Order 9328 dealing with the stabilization of wages, prices and salaries (50 U. S. C. A. App. p. 318). Executive Order 9250 recited the authority under which it was issued, as follows:

> "By virtue of the authority vested in me by the Constitution and the statutes and particularly by the Act of October 2, 1942" (The Stabilization Act).

Similar reference to the empowering statute was made in Executive Order 9328 (50 U. S. C. A. App. p. 314).

Maximum Price Regulation 445 was promulgated by the Price Administrator under authority of Executive Orders 9250 and 9328, and therefore under the Stabilization Act of 1942. Section 1420.201 of Maximum Price Regulation 445 recites the authority for its promulgation as follows:

> "Under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, as amended, the Executive Orders Nos. 9250 and 9328, Maximum Price Regulation No. 445 (Distilled Spirits and Wines), which is annexed hereto and made a part hereof, is hereby issued."

The reference to the Emergency Price Control Act of 1942, *as amended,* incorporated into this preamble the Stabilization Act of 1942, the amending statute.

Since petitioner's violation, if any, was of a regulation promulgated under the Stabilization Act of 1942, the criminal penalties of that statute, by its very terms, are applicable. This is evident from the language of the Act which extends the period of effectiveness of the Emergency Price Control Act of 1942 in so far as it is not inconsistent with the provisions of the later Act. The criminal penalties prescribed by the Stabilization Act of 1942 are clearly inconsistent with the criminal penalties prescribed by the earlier Act.

When a new statute dealing with the same subject-matter as an older one is enacted, the older statute is impliedly repealed to the extent that it is inconsistent with the new statute (*Norris* v. *Crocker,* 54 U. S. 429 (1851)). In *United States* v. *Yuginovich,* 256 U. S. 450 (1920), the Court said at page 463:

> "It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States* v. *Tynen,* 11 Wall. 88. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty."

See also: *United States* v. *Mangano,* 299 Fed. 492 (C. C. A. 8, 1924); *Maresca* v. *United States,* 277 Fed. 727, 738 (C. C. A. 2, 1921).

In holding that the instant Regulation was promulgated, at least in part, under the Emergency Price Control Act of 1942 and applying the severer penalties of that Act to the offenses charged, the Circuit Court of Appeals has disregarded the rule in favor of clemency. The Circuit Court of Appeals impliedly concedes that the instant Regulation, at least in part, was promulgated under the Stabilization Act of 1942. This Act, in continuing in effect those provisions of the Emergency Price Control Act of 1942 not inconsistent with it, was a later statute covering the entire ground of the former, but repealing those provisions of the former Act inconsistent with it. The criminal penalty provisions of the two Acts are inconsistent. The rule in favor of clemency therefore should be applied. The rule in favor of clemency is stated in *United States* v. *Windham,* 264 F. 376 (E. D. S. C. 1920), at page 377:

> "The general rule for the construction of statutes is that, when a later statute is enacted inconsistent with a preceding statute and covering the entire ground of the subject-matter, it supersedes and impliedly repeals the preceding statute. Especially is this the case when the later statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when imposed in a later statute, is presumed to supersede the earlier and heavier." (Cited with approval, *United States* v. *Yuginovich, supra,* p. 462.)

The Circuit Court of Appeals was in error in declaring that to hold that the inconsistency between the penalties in the two Acts would throw Section 7(b) (50 U. S. C. A. App. 971) out of operation and reduce it to impotence because it would leave no penalties upon which it could oper-

ate. The Emergency Price Control Act of 1942 contains penalties not referred to in the Stabilization Act of 1942 such as single and treble damages, licensing and injunctive sanctions (50 U. S. C. A. App. 925). These penalties are left undisturbed by the saving provisions of Section 7(b) of the later Act (50 U. S. C. A. App. 967(b)). There is, therefore, no incongruity in construing the criminal penalty provisions of the Emergency Price Control Act of 1942 to have been specifically modified by the explicit criminal penalty provisions of the Stabilization Act of 1942.

POINT B

There was a complete failure of proof of an essential element of the offenses charged in the Information, that is, the maximum price for the whiskey allegedly offered, sold and delivered by petitioner applicable to offers, sales and deliveries by him.

An essential element of the offenses charged was that petitioner offered to sell and sold whiskey at prices above the legal maximum applicable to him. The Information charges that petitioner offered to sell and sold whiskey for sums exceeding $11.82 a case, the maximum price permitted to be charged by him under the Maximum Price Regulation. Although it was stipulated at the trial that the legal maximum price for sales of whiskey by the importers, Park Benziger & Company and International Distributors, Inc. was $11.82 a case (fols. 171, 173), there was no evidence or stipulation respecting any maximum price chargeable by petitioner.

Maximum Price Regulation 445 establishes classifications of sellers, to-wit: importers, wholesalers, primary distributors, processors, retailers, monopoly states, trustees in bankruptcy, receivers, administrators, executors,

fiduciaries or other court officers, sheriffs, *et al.* (Sections 1.1 and 5.1, MPR 445). The Regulation prescribes a different price for each of these categories of sellers. There was no attempt at the trial to prove that petitioner came within any of these classifications. There was evidence, however, that he was not an importer and therefore not subject to the price limitation of $11.82 a case (fols. 240-242).

In order to establish a violation of the Regulation it is necessary to prove not only that the accused sold whiskey, but also that he sold it at a price in excess of the maximum applicable to him. The Government has this burden of proof. *Henderson* v. *J. B. Beaird Corp.*, 48 F. Supp. 252, 255 (W. D. La., 1943); *Brown* v. *Nu-Way Laundry Co.*, 52 F. Supp. 498, 500 (W. D. Okla., 1943); *United States* v. *Johnson*, 53 F. Supp. 167 (D. C. Del. 1943).

POINT C

Petitioner's acts were not criminal.

It is not contended by the Government that either Park Benziger & Company or International Distributors, Inc., as vendors, offered to sell or sold any whiskey at prices in excess of the proper maximum prices. There is no suggestion, therefore, that these vendors evaded the Regulation and were aided and abetted in such evasion by petitioner. The Government's theory is that the petitioner was the offeror, vendor and deliverer of the whiskey.

It was not an offense under the Regulation in effect at the time of the instant transactions to act as a finder or broker in the sale of whiskey and to receive fees for such services. The Maximum Price Regulation prohibited such fees only if they were paid to the vendor and increased his price for the whiskey above the legal maximum.

On May 2, 1944, long after the transactions in question in the Information, Maximum Price Regulation 445 was

amended by the addition of Section 7.2(a), which reads as follows:

> "(a) Every broker shall be considered as the agent of the seller and not the agent of the buyer. In each case the amount paid by the buyer to the seller plus any amount paid by the buyer to the broker shall not exceed the seller's maximum price plus allowable transportation charges actually paid by the seller or by the broker. The term 'broker' includes a 'finder,' 'buyer's agent' and 'seller's agent.'"

This amendment was added to the Regulation to correct what the Price Administrator considered an abuse and to block a loophole which he recognized to exist in the original Regulation. In view of this amendment to the Regulation specifically dealing with finder's fees, it must be presumed that the original Regulation did not cover such fees. Consequently, at the time of the transactions denounced by the Information, finder's fees were not proscribed or regulated except in so far as they might be received by vendors for the purpose of evading the Regulation.

It is a rule of construction that when the legislature enacts an amendment, that, in itself, is an indication of an intention to alter the pre-existing law.

> *Crawford, Construction of Statutes,* Sec. 304, p. 618;
> *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467, 475-476 (1911);
> *United States* v. *Bashaw,* 152 U. S. 436 (1893).

Petitioner acted as a finder in the instant transactions and did not offer to sell or sell and deliver any whiskey. Not a single witness testified to the fact or to any legal conclusion that petitioner offered to sell or sold any whiskey. The witnesses testified that petitioner told them that

whiskey could be obtained from someone else for them and that they paid him for using his influence in getting the owners of whiskey to allocate it to them. Every exhibit offered by the Government, consisting of invoices and drafts rendered by the owners of the whiskey to Moret and Waldorf Liquors, Inc., shows who the actual vendors and deliverers were. In the face of this uncontradicted evidence the Court below affirmed the action of the Trial Court in submitting the case to the jury to determine whether or not petitioner offered to sell, sold and delivered whiskey at prices in excess of the legal maximum.

The Circuit Court of Appeals has held that one may sell property which he does not own and that he need never acquire title to such property in order to pass it to a buyer, if in fact he has "command over the goods at the time of performance, so that he can procure the transfer of title from the owner to the buyer." This holding introduces a new and untenable rule into the law of property. The accepted rule is that no one can sell what he does not own unless he is the agent of the owner. Under this holding this rule is extended to permit one who has "command" over the property to convey title to it. No definition is given of the word "command." Ordinarily one who has "command" over property is the owner or the agent of the owner. Under the proof in the instant case, petitioner was neither. The Court below, however, concluded that his power to persuade the owner to sell the property to the buyer constituted "command over the goods." The power to persuade the owner of goods to sell them does not vest the person who exerts that power with authority himself to transfer title.

It is a fundamental rule of property law that no one can give what he has not. No one can sell personal property and convey title to it unless he is the owner or represents the owner or at some time acquires title to it.

Mitchell v. *Hawley*, 83 U. S. 554 (1872);
Williamson v. *Berry*, 49 U. S. 495, 543 (1850);
Williston on Sales, Second Edition, Sec. 311, p. 715.

An offer to sell is a proposal to enter into a contract whereby the seller agrees to transfer the goods and property to the buyer for a consideration called the price (Uniform Sales Act, Sec. 5). Neither Moret nor Waldorf Liquors, Inc., in accepting petitioner's offer to procure sources of whiskey for them for a fee, could have successfully sued petitioner upon his default for breach of contract for the sale of whiskey since he offered to sell none. Neither of them contended at the trial that petitioner offered to sell them anything except his services in influencing owners of whiskey to allocate and sell some to them. In this state of the record petitioner could not properly be convicted of offering to sell or selling whiskey, and affirmance of the judgment of conviction was error.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Circuit Court of Appeals reversed.

Respectfully submitted,

WALTER BROWER,

By JOHN W. BURKE, JR.,
Counsel for Petitioner.

Dated: New York, July 16, 1945.